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In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LEWIS B. MAYTAG, ALTERNATE EXECUTOR OF THE ESTATE OF DENA B. MAYTAG, DECEASED

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ORA B. MAYTAG, FRED MAYTAG II, AND MARY LOUISE MAYTAG MCCAHILL, EXECUTORS OF THE ESTATE OF E. H. MAYTAG, DECEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit entered in these cases on January 20, 1942.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 29–65) is not officially reported. The opinion of the Circuit Court of Appeals (R. 438–450) is reported at 125 F. (2d) 55.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 20, 1942 (R. 450–451). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In determining for estate and gift tax purposes the value of large blocks of stock regularly traded in upon the New York Stock Exchange, the Board of Tax Appeals took into consideration the potential reduction in the market price which would result from the artificially depressed condition of the market if the blocks of stock were thrown upon the market at one time. The question presented is whether this potential effect may properly be considered as a factor in valuing the stock.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved may be found in the Appendix, *infra,* pp. 15–22.

STATEMENT

These two consolidated (R. 125, 429–430) proceedings involve two separate liabilities, one for an

estate tax deficiency asserted against the estate of Dena B. Maytag, of which E. H. Maytag was then the executor, and the other for a gift tax deficiency for the year 1934 asserted against E. H. Maytag individually (R. 13–18, 23–27).[1] The cases as finally submitted to the Board (R. 30) involved only two issues: (1) the fair market value on January 18, 1934, the date of death of Dena B. Maytag, of the 133,859 shares of common stock of the Maytag Company which were a part of her estate, and (2) the fair market value on December 15, 1934, of the 400,000 shares of the same stock which were on that date transferred, by gift, by E. H. Maytag under four separate trusts of 100,000 shares each, for the benefit of his four children.

The facts pertinent to the question presented here, as found by the Board of Tax Appeals (R. 30–54), may be summarized as follows:

On the two critical dates, the date of death, January 18, 1934, and the date of the gifts, December 15, 1934, there was outstanding a total of 1,617,-922½ shares of the common stock of the Maytag Company, in addition to substantial amounts of two classes of preferred stock (R. 30, 32). The three classes of the stock were listed on the New York Stock Exchange (R. 49). At the dates here

[1] E. H. Maytag died after the cases had been decided by the Board, and his executors and the alternate executor of the estate of Dena B. Maytag were substituted as respondents on review in the court below (R. 433–436).

in issue, members of the Maytag family owned about 85% of all of the common stock outstanding (R. 49–50).

The trading in the common stock on the New York Stock Exchange for the years 1933, 1934, and 1935 amounted to 88,000 shares, 106,600 shares, and 194,300 shares, respectively (R. 50–51).[2]

In the estate tax return filed for the estate of Dena B. Maytag, the 133,859 shares of Maytag common stock owned by the decedent at her death were reported at a value of $2.50 a share. In the gift tax return of E. H. Maytag for the year 1934, the value of the 400,000 shares of Maytag common stock transferred under the four trusts was also stated to be $2.50 a share. (R. 54.)

The Commissioner determined a deficiency of $76,568.65 in respect of the estate tax, and of $120,666 in respect of the gift tax (R. 30). In his audits of the two returns, he determined that the 133,859 shares had a value of $4.75 a share on January 18, 1934, and that the 400,000 shares had a value of $4.5625 a share as of December 15, 1934 (R. 13–18, 23–27, 54). The $4.75 value determined by the Commissioner represented the mean between the bid and asked prices of January 18 on the New York Stock Exchange, no sales having

[2] The Board's findings included a tabulation of sales by months, with the prevailing high and low prices (R. 50–51), and a tabulation of the daily trading in the stock for the months of January and December 1934, showing the amount of sales, and bid and asked and sales prices (R. 51–52).

been recorded on the Exchange on that date, while the $4.5625 value determined by the Commissioner was the mean between the high and low sales prices recorded on the Exchange on December 15, 1934 (R. 54).

In their appeals to the Board, the taxpayers contended that the value of the stock on January 18 was between $1.50 and $2 a share and that the value on December 15 was not in excess of $2.50 a share. They asserted that the Commissioner's valuations were erroneous because he had failed to take into consideration such factors as intrinsic, liquidating, and earning values and, in particular, the large quantity of stock to be valued as compared with the small volume of trading on the Exchange, and the difficulty of disposing of any block of the size involved within a reasonable period of time at a price approximating market quotations. (R. 54–55.) The Commissioner, on the other hand, contended that the correct concept of "value" or "fair market value" was (R. 56) "the price at which the property in question would change hands, assuming a willing seller and a willing buyer, i. e., assuming an increase in demand equal to the supply or the quantity of the property in question."

The Board, after making detailed findings of fact concerning the industrial and financial history and operations of the Maytag Company (R. 30–49), held that "the effect of placing a large

block of security in the market at one time 'is a factor of great importance' " in determining value (R. 56). Accordingly it reviewed, *inter alia,* the evidence adduced by the taxpayers through three expert witnesses who testified that in their opinion the price of the Maytag common stock would have been materially depressed by an attempt to sell blocks of the size here involved (R. 57).[3] The Board then adverted to the evidence relating to the Maytag Company's record of earnings, its business, its intrinsic value, and related factors (R. 57–64). Finally, the Board stated its serious doubts "that the numbers of shares of stock here involved could have been sold within a reasonable time" after the valuation date "without affecting the prevailing market price" (R. 64). It concluded "upon all the evidence" that the 133,859 shares had a value of $3.10 a share on January 18, and that the 400,000 shares had a value of $3.80 a share on December 15, 1934 (R. 64).[4]

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[3] In general, their testimony rested upon considerations as to the size of the blocks involved and speculations as to the effect of the sale of such large blocks (R. 146–147, 152, 154–155, 160, 163, 167, 171–174, 175, 179, 182–187, 187–189); their opinions as to value were based upon the assumption of a willing seller without a willing buyer (R. 160, 174, 191). Their testimony was received over objections, made at various times during the course of its presentation, by counsel for the Commissioner, who, at its conclusion, unsuccessfully moved to have it stricken (R. 192–194; see also R. 369).

[4] The Board also stated separately as findings these conclusions as to the value of the stock (R. 54).

Accordingly, the Board entered decisions reducing the deficiency in the estate tax to $17,704.82, and in the gift tax to $71,783 (R. 65–66). Upon appeal by the Commissioner, the court below held that the size of a block of stock and the effect of its disposition in the market are factors which may be, and were, properly considered in its valuation for gift and estate tax purposes (R. 449); it therefore affirmed the decision of the Board of Tax Appeals (R. 450).

REASONS FOR GRANTING THE WRITS

The ultimate question involved in these cases is one of fact, the value for gift and estate tax purposes of stock, the determination of which by the Board of Tax Appeals does not normally warrant further review by this Court. At the threshold of an inquiry concerning valuation, however, the problem of what factors and criteria may be considered must be met. As the court below recognized (R. 448), that problem is a question of law reviewable by an appellate court. See *Powers* v. *Commissioner,* 312 U. S. 259, 260.

The sole basic issue which remains in these cases is the validity, for valuation purposes, of the so-called "blockage" theory.[5] The rationale of this

[5] Admittedly, the trading in Maytag common on the Exchange was continuous and substantial (R. 447); there was no evidence that the market was affected by fraud or manipulation, or that the quoted transactions were fictitious (R. 447); or that the prices prevailing on the Exchange did not represent the fair market value of the amounts of stock traded in (R. 159–160, 167, 174, 191; cf. R. 211–213, 268, 288–289, 314).

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theory is that a large block of stock cannot ordinarily be marketed as readily as a few shares, and that if there is only a limited market for stock, or if the number of shares sought to be valued is large in proportion to the number of shares normally traded in publicly, the offering of a large block of stock would depress the market and consequently reduce the price which it would bring. If the blockage theory is, therefore, applied, the value of each unit of a large block of stock would be lower than the prevailing market price of the stock. The amount of the reduction would, as here, be based upon opinion evidence relating to the depressing effect which the large blocks of stock would have on the market. The Board of Tax Appeals plainly adopted and applied the blockage theory in considering, for valuation purposes, the factor of the effect of placing the stock on the market (R. 56, 57, 64). The court below similarly accepted the issue as thus posed and held that the Board could properly apply the blockage theory (R. 448).

The ultimate place of the blockage theory in the field of valuation presents a problem of great importance and frequent recurrence in the administration of the estate and gift tax laws, and, as the court below expressly recognized (R. ——), one which has not yet been, but should be, authoritatively settled by this Court.

1. The question whether the valuation for estate and gift tax purposes of publicly and regularly

traded stock may properly be reduced below the fair market value as represented by its market price solely because a large block of stock is involved, the immediate offer of which might depress the prevailing market price, must necessarily be presented in virtually every case where a wealthy person dies or makes a large gift. The well-to-do frequently own blocks of stock of a size which, particularly at present when the sales on the market are small, the market may not at any given moment be able to absorb at the prevailing price. A conservative estimate of the amount of taxes, exclusive of interest, turning on the validity of the blockage theory, is not less than $7,000,000 involved in 445 pending cases.[6]

2. Although several circuit courts of appeals have held that the blockage theory could validly be applied in the valuation of stock for estate and gift tax purposes,[7] and none has expressly held to the contrary, considerable confusion concerning its ultimate place in the field exists. See *Phipps* v. *Commissioner,* decided March 23, 1942, by the Circuit Court of Appeals for the Tenth Circuit, not

[6] The Commissioner of Internal Revenue has so stated in a recent letter to the Department of Justice in response to an inquiry concerning the amount of taxes involved and the number of cases pending in the Bureau and before the Board of Tax Appeals.

[7] *Helvering* v. *Safe Deposit & Trust Co. of Baltimore* 95 F. (2d) 806 (C. C. A. 4th); *Helvering* v. *Kimberly*, 97 F. (2d) 433 (C. C. A. 4th); *Commissioner* v. *Shattuck*, 97 F. (2d) 790 (C. C. A. 7th), and cases cited by the court below (R. 450).

yet officially reported, but may be found in 1942 Prentice-Hall, Vol. 4, par. 62,576. Thus, a number of courts have held that the failure to apply the blockage theory, in circumstances not substantially different from those presented here, is not error and that valuation based on market price is substantially supported. *Phipps* v. *Commissioner, supra; Gamble* v. *Commissioner,* 101 F. (2d) 565, 567 (C. C. A. 6th), certiorari denied, 306 U. S. 664, *Roth* v. *Wardell,* 77 F. (2d) 124, 125 (C. C. A. 9th), *Richardson* v. *Helvering,* 80 F. (2d) 548, 552 (App. D. C.).[8] While perhaps no square conflict exists between these cases and the decision of the court below, it is submitted that they cannot be reconciled in principle. If the blockage theory is valid at all, it would seem that it must be applied in all cases where the block of stock is sufficiently large to make it likely that its immediate disposi-

[8] The result of these cases is in accord with the Treasury regulations. As early as 1919, the regulations provided for the valuing of listed stocks according to "the mean between the highest and the lowest sale price" on the market on the valuation date. Treasury Regulations 37 (1919 Ed.), Art. 15 (2). As later amplified, the regulations provide for "unit" valuation, i. e., valuation upon the basis of each unit of the property. Treasury Regulations 80 (1934 Ed.), Art. 13 (1); Treasury Regulations 79 (1936 Ed.), Art. 19 (1). Appendix A, *infra.* An additional statement in these editions that the size of the holdings or gifts would not be considered was omitted in 1939 (T. D. 4902, 1939–1 Cum. Bull. 325, and T. D. 4901, 1939–1 Cum. Bull. 341, *infra,* Appendix, p. 22) after its validity had been questioned in the cases cited *supra,* p. 9, n. 7.

tion would depress the market. Failure to consider this factor and reduce the valuation below the market price would, therefore, be error, yet in the cases cited no error was found.

3. Adoption of the blockage theory in cases such as this is inconsistent with familiar principles of valuation in comparable situations. Concededly (R. 56), the task before the Board of Tax Appeals was to ascertain the "fair market value" of the stock on the critical dates. It is well established that "fair market value" is the price at which property would change hands in a transaction between a willing buyer and a willing seller. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123–124; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155–156. Consequently, where the property to be valued is regularly traded in on an established market, the prices there prevailing are normally determinative of the fair market value of the property. *United States* v. *New River Collieries*, 262 U. S. 341, 345; *Standard Oil Co.* v. *Southern Pacific Co.*, *supra*, pp. 155, 158; *Whitlow* v. *Commissioner*, 82 F. (2d) 569, 572 (C. C. A. 8th); *Helvering* v. *Kendrick Coal & Dry Dock Co.*, 72 F. (2d) 330, 333 (C. C. A. 8th), certiorari denied, 294 U. S. 716.[9]

[9] See also *Commissioner* v. *Robertson*, 75 F. (2d) 540, 541–542 (C. C. A. 6th), certiorari denied, 295 U. S. 763; *Hazeltine Corp.* v. *Commissioner*, 89 F. (2d) 513, 518–519 (C. C. A. 3d); *W. T. Grant Co.* v. *Duggan*, 94 F. (2d) 859, 861–862 (C. C. A. 2d); *Union Nat. Bank of Pittsburgh* v. *Driscoll*, 32 F. Supp. 661, 662 (W. D. Pa.).

No different rule should be applied simply because the block of stock to be valued may be deemed, on the basis of expert opinion, to be greater than the market could absorb within a short period of time.[10] For the test of value for tax purposes is not the price at which property can immediately be liquidated, but the price at which the property would change hands between a willing buyer and a willing seller. In valuing a large block of stock, therefore, it must be assumed that there is a demand for that stock equivalent to its supply. But the very nature of the blockage theory as here approved by the court below presupposes the existence of an artificially depressed market rather than the normal market where the demand is equivalent to the supply and where both the sellers and the buyers are "willing."

Any other rule would result in the anomaly that two shares of stock, each of which represents the same interest in the same corporate enterprise, may on the same date have different values for tax purposes simply because they are owned by different persons. This would seem to be violative of the broad basic intent of Congress to tax uniformly and at rates graduated according to the amount

[10] That, in any event, such an inquiry may be entirely hypothetical is demonstrated by the instant case, where, as the court below recognized (R. —), there is no showing whatsoever that the changes in ownership occasioned by the death and the transfers in trust resulted in any actual increase in the supply of shares on the market.

of the estate or gift. See Section 301 (a) of the Revenue Act of 1926; Section 401 (a) and (b) and Section 502 of the Revenue Act of 1932, Section 405 of the Revenue Act of 1934.

Ex hypothesi, the blockage theory becomes operative only where the number of shares of stock is so large that its immediate public disposition would depress the market. It inures to the benefit, therefore, exclusively of the well-to-do with large holdings. A person transferring a small number of shares would be taxed at a higher valuation than the one transferring a large lot of shares, and this although the shares are otherwise identical and the transfers occur simultaneously.[11]

4. Respondents may urge, in opposition to this petition, that the Board's valuation finding was made "upon all the evidence" (R. 64), and that there is substantial evidence to support this finding even apart from the blockage theory. It is clear from the Board's opinion, however, that the Board gave great weight to the blockage theory; indeed, in view of its observation with respect to the "splendid record" of the company (R. 63), its finding of a value considerably below the market price

[11] The result is, moreover, inconsistent with the standard business practice of banks, trust companies, insurance companies, and similar institutions to make no discount in valuing security portfolios, based on the size of the block (R. 41, 162, 175, 318). Valuation of property for tax purposes should conform as nearly as possible to standard business practices. *Maass* v. *Higgins*, 312 U. S. 443, 449.

is probably attributable primarily to that theory. In any event if, as we contend, consideration of the blockage theory was error, the Commissioner seems clearly entitled to have the case remanded to the Board for a redetermination of value upon the basis of only the legally relevant and competent evidence.

It is, we believe, appropriate to point out that in almost every "blockage" case which arises, other evidence than that with respect to blockage is introduced and the ultimate valuation finding is normally made upon the basis of the entire record. If the existence of such other evidence should preclude review of the blockage theory in this case, it seems unlikely that the Commissioner could ever secure an authoritative ruling from this Court upon this highly important fiscal problem.

CONCLUSION

It is respectfully submitted that this petition for writs of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.